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Mydepot Sdn Bhd v Clarity Excel Sdn Bhd

B HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12BNCvC-6–01 OF 2019
TUN ABD MAJID JC
27 SEPTEMBER 2019

C *Civil Procedure — Appeal — Appeal from sessions court to High Court — Memorandum of appeal ('MOA') — Appellant failed to include MOA in appeal record because grounds of judgment were not available — Previous position under O 49 r 3A of the Subordinate Courts Rules 1980 had been altered by O 55 r 4 of the Rules of Court 2012 to make it mandatory for appeal record to contain* D *MOA even if grounds of judgment were unavailable — Order 55 r 4 allowed for MOA to be amended and filed in supplementary appeal record after grounds of judgment were made available — Application for extension of time to make good filing of MOA four days out of time had to be refused as failure was a blatant disregard of the Rules of Court*

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The appellant filed an appeal to the High Court against the decision of the sessions court after full trial but omitted to include the memorandum of appeal ('the MOA') in its appeal record. When the respondent took objection to the F omission during case management, the appellant promptly filed the MOA and, three days later, applied for an extension of time to make good the four-day delay in the filing of the MOA. The appellant said it did not include the MOA in the appeal record because the grounds of judgment were not available. It said if it had still proceeded to file a MOA, it might have contained errors or G inaccurate grounds for appeal. The appellant said that since the hearing of the appeal had yet to be fixed, the delay of four days in the filing of the MOA would not prejudice the respondent. The respondent replied that the appellant's reasons for not filing and serving the MOA in time were not valid as O 55 r 4 of the Rules of Court 2012 mandatorily required the appeal record to contain H the MOA even if the grounds of judgment were unavailable. The respondent said that under O 55 r 4 an MOA that had been filed could be amended and included in a supplementary appeal record together with the grounds of judgment when it was subsequently made available. The respondent said the appellant's filing of the MOA without obtaining leave of court and without I being accompanied by the application for extension of time was fatal.

Held, dismissing the appellant's application:

(1) Under the previous O 49 r 3A of the Subordinate Courts Rules 1980, no reference was made at all to the memorandum of appeal and it did not

form part of the appeal record. This was the cause of the confusion. Order 55 r 4 of the Rules of Court 2012, however, had altered the position to clearly provide that the memorandum had to be included in the appeal record. It also provided that the memorandum could be amended once the grounds of judgment were available (see paras 10–11).

(2) The requirement to incorporate the memorandum in the appeal record was fundamental and the failure to do so was a blatant disregard of the Rules of Court (see paras 14–15).

[Bahasa Malaysia summary

Perayu telah memfailkan rayuan kepada Mahkamah Tinggi terhadap keputusan mahkamah sesyen selepas perbicaraan penuh tetapi gagal menyertakan memorandum rayuan ('memorandum rayuan') ke dalam rekod rayuan. Semasa responden membantah ke atas kegagalan untuk memasukkan memorandum rayuan, perayu dengan segera memfailkan memorandum rayuan dan tiga hari kemudian, memohon untuk lanjutan masa bagi memperbaiki kelewatan selama empat hari untuk memfailkan memorandum rayuan. Perayu menyatakan bahawa beliau tidak menyertakan memorandum rayuan ke dalam rekod rayuan kerana alasan penghakiman belum disediakan. Perayu menyatakan bahawa sekiranya masih ia meneruskan untuk memfailkan memorandum rayuan, mungkin terdapat kesalahan atau terdapat alasan-alasan rayuan yang tidak tepat. Perayu berhujah bahawa disebabkan pendengaran rayuan masih belum ditentukan, kelewatan empat hari untuk memfailkan memorandum rayuan tidak akan memprejudiskan responden. Reponden berhujah bahawa alasan-alasan perayu untuk tidak memfailkan dan menyerahkan memorandum rayuan dalam tempoh yang sepatutnya adalah tidak sah kerana A 55 k 4 Kaedah-Kaedah Mahkamah 2012 mewajibkan rekod rayuan untuk mengandungi memorandum rayuan walaupun alasan penghakiman masih belum disediakan. Responden berhujah bawah A 55 k 4, memorandum rayuan yang telah difailkan boleh dipinda dan disertakan dalam rekod rayuan tambahan berserta alasan-alasan penghakiman apabila ianya disediakan. Responden berhujah bahawa perayu telah memfailkan memorandum rayuan tanpa kebenaran mahkamah dan tanpa permohonan untuk lanjutan masa memberikan kesan yang serius.

Diputuskan, menolak permohonan perayu;

(1) Di bawah A 49 k 3A Kaedah-Kaedah Mahkamah Rendah 1980 yang terdahulu, tiada rujukan dibuat langsung kepada memorandum rayuan dan ianya tidak menjadi sebahagian daripada rekod rayuan. Ini telah menjadi punca kekeliruan. Aturan 55 k 4 Kaedah-Kaedah Mahkamah 2012 telah mengubah kedudukan tersebut dengan menyatakan dengan jelas bahawa memorandum rayuan perlu disertakan bersama rekod rayuan. Ia juga menyebut bahawa memorandum rayuan boleh dipinda

apabila alasan-alasan penghakiman telah disediakan (lihat perenggan 10–11).

(2) Keperluan untuk memasukkan memorandum rayuan di dalam rekod rayuan adalah asas penting dan kegagalan untuk berbuat demikian adalah pengabaian yang terang-terangan terhadap Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 14–15)]

Cases referred to

Chuah Tim Lan v RHB Bank Bhd & Anor [2008] 6 MLJ 793, CA (refd)
Cosway (M) Sdn Bhd & Anor v Gan Poh Im [2006] 1 MLJ 568, CA (folld)
Duli Yang Amat Mulia Tunku Ibrahim Ismail ibni Sultan Iskandar Al-Haj, Tengku Mahkota Johor v Datuk Captain Hamzah Mohd Noor (and another appeal) [2009] 4 MLJ 149, FC (refd)
Hafizuddin bin Noordin v Pacific & Orient Insurance Co Bhd [2015] 10 MLJ 612, HC (refd)
Metroport Air Services Sdn Bhd v Cargostreetz Sdn Bhd [2018] MLJU 1695, HC (refd)
Owners of the Ship or Vessel Sasacom I v Bank Pembangunan Malaysia Bhd [2015] 4 MLJ 841, CA (folld)
Raja Guppal a/l Ramasamy v Sagaran a/l Pakiam [1999] 2 MLJ 677, CA (refd)
Tan Chai Huat v Yap Tian Leong [2018] MLJU 383, HC (refd)
Yaw Fun Fun (pemilik tunggal perniagaan yang dikenali sebagai perniagaan Smart Power Land) v Ketua Polis Daerah Gombak, Selangor & Ors [2018] MLJU 714, HC (refd)

Legislation referred to

Rules of Court 2012 O 1A, O 3 r 5, O 55 r 4, 4(1), 4(d)
Rules of the Court of Appeal 1994 r 18
Subordinate Courts Rules 1980 O 49 r 3A

Lim Wei Han (Shu Yin, Teh & Taing) for the appellant.
Ahmad Zulkefli (Hasan Sabri & Hashim Nazri) for the respondent.

Tun Abd Majid JC:

[1] The appellant on 18 January 2019 has filed a notice of appeal against the decision of the sessions court and duly filed the record of appeal within time (17 Febuary 2019) but without the memorandum of appeal. During the case management on 19 Febuary 2019 the respondent raised a preliminary objection as as regards the absence of memorandum in the record of appeal. The appellant subsequently on 22 Febuary 2019 filed the memorandum of appeal and on 25 Febuary 2019 vide encl 17 sought to obtain an extension of time to file its memorandum of appeal which was delayed by four days. Having heard the arguments, I dismissed the appellant's application with costs.

ENCLOSURE 17 A

[2] The application for an extension of time as affirmed by the appellant in his affidavit in support was premised upon:

(a) the grounds of judgment was not available; B

(b) the memorandum if filed may contain errors or inaccurate grounds;

(c) O 55 r 4 of the Rules of Court 2012 does not specifically provide that the memorandum of appeal should be filed despite the absence of the grounds of judgment, as such his solicitor adopted the procedure as provided by the Rules of the Court of Appeal 1994; C

(d) the hearing of the appeal has not been fixed yet and the parties have yet to file their written submissions;

(e) the memorandum of appeal has subsequently been filed on 22 Febuary 2019; and D

(f) the delay of four days does not prejudice the respondent.

[3] In opposing this application the respondent stated as follows: E

(a) it is a mandatory requirement that the record of appeal should contain the memorandum of appeal notwithstanding the unavailability of the grounds of judgment;

(b) the memorandum of appeal filed may be amended and be included in the supplementary record of appeal together with the grounds of judgment; F

(c) the memorandum of appeal which was filed on 22 Febuary 2019 without leave and without being accompanied with the application for extension of time is defective; G

(d) no cogent and valid reasons given for the delay in filing and serving the memorandum of appeal; and

(e) the Rules of the Court of Appeal 1994 does not apply; H

[4] The matter was fully heard before the learned sessions court judge ('SCJ'), it was a decision after a trial and as the matter emanated from the sessions court the procedure for the preparation of the record of appeal is set out in O 55 r 4 of the Rules of Court 2012 ('the RC 2012') which provides as follows: I

> 4(1) In the case of an appeal from a decision after trial, the appellant shall within one month from the date of filing of notice of appeal prepare and file the requisite number of copies of the record of appeal and the record shall contain copies of:

(a) the relevant pleadings;

(b) the notes of evidence, including witness statements, if available;

(c) the grounds of judgment, if available;

(d) the memorandum of appeal;

(e) the decision, order or judgment;

(f) duplicate copy of the notice of appeal;

(g) duplicate copy of the notice of cross appeal, if any;

(h) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of the appeal:

Provided that the record of appeal shall be filed notwithstanding that the notes of evidence and/or grounds of judgment are not ready or that the sealed decision, order or judgment has not been extracted.

(2) In the event the notes of evidence and/or grounds of judgment are not ready or the sealed decision, order or judgment has not been extracted within the period specified in rule 4(1) above, then the notes of evidence and/or grounds of judgment, where they are made available and a copy of the sealed decision, order or judgment when extracted, shall be filed by way of a supplementary record of appeal without leave of the High Court:

Provided also that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal.

(3) The memorandum of appeal shall be substantially in Form 112 and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively. Notwithstanding rule 8 of this Order, where a supplementary record of appeal is to be filed pursuant to rule 4(2) above, the appellant may if necessary also include in the supplementary record of appeal an amended memorandum of appeal, without leave of the High Court.

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

SUBMISSIONS

[5] The learned counsel for the appellant referred to O 3 r 5 of the RC 2012 and relied on *Cosway (M) Sdn Bhd & Anor v Gan Poh Im* [2006] 1 MLJ 568 in support of his argument that the court has the discretion to extend the time as prayed for. It was further submitted that without the benefit of the grounds of judgment, the issues raised in the memorandum of appeal may be misleading

and inaccurate. The learned counsel also referred to the proviso of r 4(1) which led to the uncertainty as it only mentions the notes of evidence and/or the grounds therefore, he opted to adopt the procedure in the Rules of the Court of Appeal 1994 ('the RCA 1994').

[6] In addition, the learned counsel submitted that the hearing of the appeal has not been fixed yet and it was still at the early stage and the delay was only four days thus, the respondent was not prejudiced. References were also made to the cases of *Hafizuddin bin Noordin v Pacific & Orient Insurance Co Bhd* [2015] 10 MLJ 612 and *Yaw Fun Fun (pemilik tunggal perniagaan yang dikenali sebagai perniagaan Smart Power Land) v Ketua Polis Daerah Gombak, Selangor & Ors* [2018] MLJU 714.

[7] The learned counsel for the respondent submitted that under O 55 r 4 of the RC 2012 it was mandatory to file the record of appeal incorporating the memorandum of appeal and the said memorandum may be amended and re-filed together with the grounds of judgment subsequently. The absence of the memorandum would render the record of appeal defective. References were made among others to *Tan Chai Huat v Yap Tian Leong* [2018] MLJU 383; *Metroport Air Services Sdn Bhd v Cargostreetz Sdn Bhd* [2018] MLJU 1695; *Raja Guppal a/l Ramasamy v Sagaran a/l Pakiam* [1999] 2 MLJ 677 and *Chuah Tim Lan v RHB Bank Bhd & Anor* [2008] 6 MLJ 793. The learned counsel further submitted that following *Duli Yang Amat Mulia Tunku Ibrahim Ismail ibni Sultan Iskandar Al-Haj, Tengku Mahkota Johor v Datuk Captain Hamzah Mohd Noor (and another appeal)* [2009] 4 MLJ 149 O 1A of the RC 2012 cannot be invoked.

DECISION

[8] Notwithstanding the mandatory provision of O 55 r 4 of the RC 2012 I agreed with the learned counsel for the appellant that this court is vested with the discretion to entertain the application for extension of time as decided by the Court of Appeal in *Cosway*.

[9] In *Cosway* the previous counsel for the appellant made a mistake by filing the memorandum of appeal together with the appeal record which was not a requirement then and upon realising his mistake six weeks later the counsel re-filed the same memorandum which by then was already out of time. The High Court refused the appellant's application for an extension of time. The Court of Appeal in allowing the appeal held that the respondent was not prejudiced since the latter had notice of the said memorandum which was filed earlier and there was no blatant disregard of the rules.

[10] Order 55 r 4(d) of the RC 2012 clearly provides that the memorandum

of appeal has to be included in the record and it is also provided that the same can be amended once the grounds of judgment is available. Unlike the previous position under O 49 r 3A of the Subordinate Court Rules 1980 where there were conflicting decisions which was eventually put to rest by *Cosway*. There is no ambiguity in the language as far as O 55 r 4 of the RC 2012 is concerned.

[11] This was not the position previously where the then Subordinate Courts Rules 1980, O 49 r 3A provides:

> (1) When the appellant who is represented by a solicitor has complied with the requirements of rule 2 of this order, the appellant shall prepare the requisite number of copies of the appeal record and the record shall contain copies of —
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> (a) the relevant pleadings;
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> (b) the notes of evidence in proceedings recorded wholly or partly by mechanical means;
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> (c) the grounds of judgment, provided that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal;
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> (d) the decision;
>
> (e) the notice of appeal;
>
> (f) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of appeal.
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> (2) If the appellant shall consider that any documentary exhibit used need not be included in the record he shall obtain the consent in writing of all parties to the appeal to the omission of the document from the record. Such written consent shall be included in the appeal record.
>
> (3) Two copies of the appeal record shall be filed in the High Court within six weeks of the receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready.
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> (4) The appellant shall within the period limited for the filing of the record serve a copy thereof on each party who has been served with the notice of appeal.

Nowhere does this provision make any reference to the memorandum of appeal and that was the cause of the confusion. Previously the memorandum of appeal did not form part of the appeal record. But O 55 r 4 of the RC 2012 has altered the position where presently the memorandum of appeal is part of the appeal record.

[12] I agreed with the contention of the learned counsel for the respondent that the RCA 1994 has no application as this matter originated from the sessions court. Given the clear language in O 55 r 4 of the RC 2012, I cannot fathom how the learned counsel for the appellant could argue that there is ambiguity in the said provision and opted to follow the RCA 1994.

[13] In *Duli Yang Amat Mulia Tunku Ibrahim Ismail* Zaki Azmi CJ at p 163 had this to say with regard to O 1A:

> A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the rules. Order 1A cannot be invoked when a party intentionally disregards in complying with the rules. Otherwise, parties would be encouraged to ignore the rules.

[14] The Federal Court examined whether the provision which had been infringed was fundamental or otherwise for O 1A to be applicable. To my mind the requirement to incorpo rate the memorandum of appeal is fundamental and I find support in the Court of Appeal's case of *Owners of the Ship or Vessel Sasacom I v Bank Pembangunan Malaysia Bhd* [2015] 4 MLJ 841 which took a serious stand on compliance with the rules in particular r 18 of the RCA 1994 concerning the undated memorandum of appeal and failure to incorporate the amended judgment in the record of appeal. It was held by Abdul Wahab Patail JCA at p 845:

> The purpose the provision in r 18 to file a memorandum of appeal is to give the respondent the opportunity to prepare and respond to the grounds laid out in the memorandum of appeal. It is a fundamental rule of justice. The appellant cannot put forward without leave of the court any other ground: see r 18 sub-r (2). It is clear that a signed but undated memorandum of appeal fails to comply with r 18. The breach in this case is therefore a breach of a fundamental rule and cannot be excused in a court of justice on the grounds of inadvertent error or on the assertion it does not prejudice the respondent.

[15] The Court of Appeal dealt with a defective memorandum of appeal whereas before me is the absence of same. I consider the failure to incorporate the memorandum of appeal as a blatant disregard of the rules. The application was therefore dismissed with costs.

Appellant's application dismissed.

Reported by Ashok Kumar